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In the Supreme Court of the United States

OCTOBER TERM, 1950.

No. 278.

ROY BROWN,
Petitioner,

v.

WATT CAR & WHEEL CO.

BRIEF OF RESPONDENT IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

Your Respondent, The Watt Car & Wheel Co., respectfully opposes the petition of the Solicitor General in the above entitled cause, and, in support of its opposition, submits the following brief.

OPINIONS BELOW.

The District Court of the Southern District of Ohio, Eastern Division, wrote a Memorandum Opinion (R. 17), with findings of fact and conclusions of law, and entered judgment accordingly in favor of the Respondent (R. 19).

The Court of Appeals for the Sixth Circuit affirmed the judgment. Its opinion is reported at 182 F. 2d 570, and is set forth in full at page 23 of the Record herein.

JURISDICTION.

The judgment of the Court of Appeals (R. 23) was entered on June 1, 1950. The petition for a writ of certiorari was filed on August 29, 1950. The jurisdiction of the Court is invoked under 28 U. S. C. 1254 (1).

COUNTER-STATEMENT OF QUESTIONS INVOLVED.

1. On the basis of the Agreed Statement of Facts, where the vacation rights have been established by contract between the employer and the collective bargaining agent *since* the induction into the Army of the petitioning employee (there being no vacation rights at the time of his induction, R. 5), and the employer has treated the Petitioner in accordance with the contracting parties' interpretation of their contract, and in the same manner as non-veteran employees on furlough or leave, is the Petitioner entitled to greater rights by reason of 50 U. S. C. App. 308?

2. Do vacation rights come within the purview of Section 8 (c) of the Selective Training and Service Act of 1940, and does that section of the Statute mean what it says?

STATEMENT.

The statement of the Petitioner is not entirely correct. It states that the restored veteran claimed to be entitled to two weeks instead of the one week vacation pay allowed him "by virtue of a collective bargaining agreement," but fails to point out the following Agreed Facts (R. 6):

> "6. That, under the foregoing provisions of the contract the Company and the signatory union have followed the practice of handling veterans' vacations in the manner in which plaintiff has been treated." (Interpretation by the parties.)

Also the following Agreed Facts (R. 5):

> "2. That on or about December 10, 1945, the plaintiff was honorably discharged; that he applied for reemployment; that defendant *restored him to his former position with the pay and seniority of said position* on January 4, 1946." (Italics added.)
>
> "4. That, at the time of plaintiff's induction into the U. S. Army, in 1942, the employees of the defendant were not entitled to any vacation with pay, nor was there any two weeks vacation with pay until the union contract in 1945."

The Petitioner's statement does set forth the Agreed Fact that non-veterans on furlough or leave of absence are not permitted, by the rules and practices of the employer, to count such time toward the five years continuous employment required in order to be eligible for two weeks vacation with pay.

On page 5 of his brief Petitioner erroneously makes the statement that the contract provisions quoted by the Court of Appeals (R. 24) made vacations depend solely on length of service. This, of course, is merely his argument, which is refuted by the Court of Appeals (R. 25-26) and by the interpretation of the parties to the contract by their conduct and practice.

The Court of Appeals held that the Appellee (Respondent) has fully complied with the Act by restoring Petitioner to his position as required by Sec. 8 (b) B and by conforming to Sec. 8 (c) without discrimination. (R. 25-26.)

ARGUMENT OPPOSING GRANTING OF WRIT.

There is no substantial basis upon which to grant the writ sought in this case.

1. The Decision of the Sixth Circuit Court of Appeals Is Not in Conflict With the Opinion of the Court of Appeals for the Third Circuit.

The Petitioner refers to the case of *Mentzel v. Diamond, d.b.a. Elizabeth Iron Works,* 167 Fed. (2d) 299 (C. A. 3, 1948) as being in conflict with the instant case. But it is quite apparent (aside from difference in the facts) that the Third Circuit Court of Appeals abandoned its conclusion in the *Mentzel* case when it decided *Dougherty v. General Motors Corp.,* 176 Fed. (2d) 561 (C. A. 3, 1949). Without any reference to its previous decision the Court held that a veteran was not entitled to vacation pay for the year of his return from the service, on the ground that the new collective bargaining contract was not discriminatory but

applied to veterans and non-veterans alike. The Court cited with approval the decisions of the Court of Appeals for the Second Circuit, thus bringing itself into line with all other Courts of Appeals and District Courts which have had the subject before them. *Siaskiewicz v. General Electric Co.*, 166 Fed. (2d) 463; *Dwyer v. Crosby*, 167 Fed. (2d) 567; *Seattle Star, Inc. v. Randolph*, 168 Fed. (2d) 274 (C. A. 9). The Court rejected the argument that the veteran would have been working the year before if he had not been in the Army. The *Dougherty* case was denied certiorari by this Court February 13, 1950.

The decision in the *Mentzel* case, since abandoned by the Third Circuit, can be accounted for in the following manner: (1) there was no showing of the treatment accorded non-veteran employees on leave, therefore no test of application of the contract provision. This distinction was pointed out by the District Court for the Eastern District of Michigan, Southern Division, in the case of *Cushnier v. Ford Motor Company*, 89 Fed. Supp. 491; (2) the decision was practically *ex parte*. The defendant had abandoned his case for lack of funds and no brief was filed. No counsel appeared for him, whereas both the Union and the U. S. Attorney appeared for the plaintiff. The Court was left without sufficient evidence and assistance of counsel.

2. The Decision of the Court of Appeals Is Not in Conflict With the Decisions of the Supreme Court.

Counsel will not presume to explain to this Court its own recent decisions. However, it seems clear that *Oakley v. Louisville & N. R. Co.*, 338 U. S. 278, involves simply a veteran employee's seniority status. No question of seniority is involved in the instant case and the Court of Appeals disposes of the point very clearly in its opinion (R. 25-26). See also *Siaskiewicz v. General Electric Co.*, 166 Fed. (2d) 463 (C. A. 2). Indeed the Agreed Statement of Facts stipulates "that defendant restored him to his

former position with the pay and *seniority* of said position * * *" (R. 5). (Italics added.)

In *Aero-Nautical Industrial Lodge v. Campbell,* 337 U. S. 521, Justice Frankfurter says that the Act gives the veteran the status of one who has been on furlough or leave of absence, but he is not to be favored as such against his fellows; that "this is the essence of our decision in *Fishgold v. Sullivan Drydock & Repair Co.,* 328 U. S. 275."

3. There Is No Confusion as to the Interpretation of the Selective Training and Service Act of 1940.

It seems to be very well established that the Act clearly preserves seniority rights as same are understood in collective bargaining. As to insurance, vacations and other benefits which are not usually regarded as part of the seniority status, Congress has given us Section 8 (c) as a guide. Indeed the Solicitor of the Department of Labor, as late as 1947, stated categorically that vacation rights came under Section 8 (c), and that time in the service need not be counted toward ascertaining vacation rights. Opinion Letter July 15, 1947. This opinion seems to be unanimous except for the Solicitor General's Office.

4. The Instant Case Is Not of Great Continuing Importance.

The Selective Service and Training Act of 1940 has been superseded by the Act of 1948. Whether or not the wording of the new Act will effect a different interpretation of Congressional intent is not here involved. The U. S. Attorney raised the point in *Nevins v. Curtiss-Wright Corp.,* 172 Fed. (2d) 535 (C. A. 6, 1949), but the Court held that the case was governed by the 1940 Act. It would seem that this reduces the importance of the instant case, as all men now in the armed service will come under the 1948 act as extended.

CONCLUSION.

On the basis of the particular facts in this case and the reasons stated, and because of the unanimity of the opinions of all the lower courts which have considered the issue herein, we respectfully submit that the petition for a writ of certiorari should be dismissed.

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